IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

CITY OF ALPINE, et al., Plaintiffs,	§ §	
v.	§ §	Civil Action No. PE:09-CV-00059-RAJ
GREG ABBOTT, Texas Attorney General, and THE STATE OF TEXAS, Defendants.	§ § §	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The First Amendment protects citizens against government oppression—not government against citizen oversight. Open government laws are based on the same premise: that public officials work for the people. For these reasons, openness in government is a First Amendment virtue, not a First Amendment violation.

The fundamental purpose of the First Amendment is to enable and empower people to engage in free, robust discourse about their government, its officials, and the policies they adopt on their behalf. Open meetings laws thus further, rather than frustrate, fundamental First Amendment values, by educating the public about the conduct and content of public business. Indeed, courts have frequently invoked the First Amendment itself to *require* public access to certain government proceedings. The Constitution does not forbid what in many contexts it actually requires.

Every State has enacted an open meetings law. And every court to have addressed the issue has rejected First Amendment challenges to such laws—including this Court. *See Rangra v. Brown*, 2006 WL 3327634 (W.D. Tex. 2006), *appeal dismissed as moot*, 584 F.3d 206 (5th Cir. 2009).

There is no reason for the Court to reverse its earlier judgment. To the contrary, the Supreme Court twice this year reaffirmed the wisdom of this Court's prior ruling, rejecting by overwhelming margins First Amendment attacks on openness and transparency in government. *See Doe v. Reed*, 2010 WL 2518466 (U.S. June 24, 2010); *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

This judicial consensus in support of openness and transparency is easy to understand. At bottom, Plaintiffs' constitutional attack is about protecting not free speech, but *secret* speech. What's more, Plaintiffs demand the right to engage in secret, anonymous speech, despite the fact that they are government officials, and despite the fact that the Texas Open Meetings Act provisions challenged by Plaintiffs apply only when a quorum of public officials discusses public business.

There is, to be sure, a limited First Amendment right to engage in anonymous speech, where necessary to protect private persons against unjust retaliation. But what Plaintiffs seek here is not protection against unjust retaliation—but rather, immunity for government officials from political accountability to their constituents. Nothing in the First Amendment compels this counterintuitive result. Accordingly, Defendants' motion for summary judgment should be granted.

ARGUMENT

"[T]he Constitution . . . embraces political transparency." *Doe*, 2010 WL 2518466, at *17 (Sotomayor, J., concurring). There is no "right to legislate without public disclosure"—to the contrary, "the exercise of lawmaking power in the United States has traditionally been public." *Id.* at *21 (Scalia, J., concurring). In fact, "[t]he belief that the public is entitled to greater access to meetings of government bodies has inspired all 50 states to pass statutes that require certain public agencies to conduct all official meetings in sessions open to the public." *St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Sch.*, 332 N.W.2d 1, 5 (Minn. 1983). *See* App. (survey of open meetings laws).

The Texas Open Meetings Act (TOMA) is well within the mainstream of this body of law. Every open meetings law requires members of governmental bodies to discuss public business in the open, typically only whenever a quorum of members has assembled (although some laws apply only where deliberation is accompanied by an actual decision, other laws, like TOMA, apply to discussions about public business even in the absence of a formal decision). Every open meetings law requires advance notice to the public when such a discussion will take place (although the specific nature of the required notice, such as the number of days and the manner of such notice, may vary). Most open meetings laws impose penalties for individual violators—and although jurisdictions vary with respect to the severity of the penalty, no jurisdiction imposes more than one

year of jail time for knowing violations of the law. Texas law imposes no penalty absent knowing conduct, while some states are more restrictive, imposing liability for negligence or even strict liability. Finally, many open meetings laws, like TOMA, have been construed to apply to electronic as well as physical, in-person discussions (while some have yet to be construed on this point). *See also* TEX. GOV'T CODE § 551.128 (authorizing Internet broadcasts of open meetings).

Given the ubiquity of such laws, it is unsurprising that *every* court to address the validity of an open meetings law under the First Amendment has upheld the law. The D.C. Circuit upheld a federal open meetings law in *Center for Auto Safety v. Cox*, 580 F.2d 689, 694 (D.C. Cir. 1978). State supreme courts in Illinois, Colorado, Kansas, Nevada, Minnesota, and Tennessee have likewise upheld their respective open meetings laws.[1] And TOMA has been upheld by both state and federal courts as well. *See, e.g.*, *Hays County Water Planning P'ship v. Hays County*, 41 S.W.3d 174, 181-82 (Tex. App.—Austin 2001, pet. denied); *Rangra*, 2006 WL 3327634, at *4-9.

This broad consensus in favor of open meetings laws is entirely understandable, because requiring officials to conduct public business in public furthers, rather than frustrates, fundamental First Amendment values. As the Supreme Court has repeatedly reminded us, the purpose of the First Amendment is to empower citizens to engage in a free, open, and informed discussion about our government, our elected officials, and the policies they put forth on our behalf.[2]

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1. *See, e.g.*, *Cole v. State*, 673 P.2d 345, 350 (Colo. 1983); *People ex rel. Difanis v. Barr*, 414 N.E.2d 731, 739 (Ill. 1980); *State ex rel. Murray v. Palmgren*, 646 P.2d 1091, 1099 (Kan. 1982); *St. Cloud*, 332 N.W.2d at 7; *Sandoval v. Bd. of Regents*, 67 P.3d 902, 907 (Nev. 2003); *Dorrier v. Dark*, 537 S.W.2d 888, 892 (Tenn. 1976). *Knight v. Iowa Dist. Court of Story County*, 269 N.W.2d 430 (Iowa 1978), involved a Due Process, not First Amendment, claim, invalidating an Iowa law because (unlike Texas law) it criminalized the mere fact that a closed meeting had occurred—without specifying, in any terms whatsoever, what an individual could do to fall within the prohibition.

2. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (noting "the role of the First Amendment . . . in affording the public access to discussion, debate, and the dissemination of information and ideas"); *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 541 (1980) (same).

Indeed, courts have repeatedly invoked the First Amendment *itself* to require open, public access to a variety of government proceedings. For example, the Supreme Court has invoked the First Amendment to open a variety of criminal judicial proceedings. *See Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 509-11 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604-05 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580-81 (1980). After all, "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs" and "to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." *Globe Newspaper*, 457 U.S. at 604 (quotations omitted). "[T]he First Amendment embraces a right of access to criminal trials . . . to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one." *Id.* at 604-05. Other courts have likewise interpreted the First Amendment to require access to a wide variety of other public proceedings.[3]

The First Amendment does not forbid what, in many contexts, it actually *requires*—openness in government. *Cf. Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 709 (9th Cir. 1997) ("lest we lose sight of the forest for the trees, [the Constitution] does not require what it barely permits"). Courts have enforced a right of public access to government proceedings under the First Amendment itself. And even if this "'right' is more accurately characterized as an 'interest' that States can choose to protect," *Hill v. Colorado*, 530 U.S. 703, 717 n.24 (2000), the point remains the same: Open meetings laws like TOMA further, rather than offend, the First Amendment.

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3. *See, e.g.*, *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695, 700 (6th Cir. 2002) ("First Amendment right of access to certain aspects of the executive and legislative branches," such as deportation proceedings); *Whiteland Woods, L.P. v. Twp. of West Whiteland*, 193 F.3d 177, 180-81 (3d Cir. 1999) (planning commission meetings); *Cable News Network, Inc. v. Am. Broad. Cos.*, 518 F. Supp. 1238, 1245 (N.D. Ga. 1981) (White House events). *But see, e.g.*, *Calder v. IRS*, 890 F.2d 781, 783 (5th Cir. 1989) (construing *Richmond Newspapers* narrowly, rejecting First Amendment claim to see Al Capone's tax records).

Accordingly, there is no reason for this Court to reverse its earlier judgment upholding TOMA against First Amendment attack. To the contrary, this Court's earlier ruling has proven prescient. Just this year, the Supreme Court has issued a series of rulings reaffirming, more clearly than ever before, that Plaintiffs' First Amendment attack on open government is indeed meritless.

I. Plaintiffs' Facial Challenge Is Destined To Fail Because They Cannot Demonstrate That TOMA Is Unconstitutional In Its Typical Application.

Plaintiffs present only a facial challenge to TOMA. In this case, just as in the Supreme Court's recent ruling in *Doe*, "plaintiffs' claim and the relief that would follow . . . reach beyond the particular circumstances of these plaintiffs." 2010 WL 2518466, at *6. Specifically, Plaintiffs here seek "declaratory judgment and injunction that the criminal provisions of TOMA may not be enforced"—period—not just against Plaintiffs themselves, and not just as applied to their specific activities or circumstances. Compl. ¶ 31(a).

Because Plaintiffs have only presented a facial challenge, it would not be enough for them to simply construct a hypothetical fact pattern in which, theoretically, TOMA might not validly apply (even if they could do so). Instead, Plaintiffs must prove that "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) (quotations omitted) (cited in *Doe*, 2010 WL 2518466, at *6). Because they cannot (and do not) do so here, their claim is destined to fail.

II. The Supreme Court Has Drawn A Sharp Distinction Between Laws That Restrict Free Speech and Laws That Require Disclosure and Thus Restrict Only Secret Speech.

Plaintiffs claim that TOMA is unconstitutional because it "prevents public officials in Texas from exercising their free speech rights." Compl. ¶ 27. The conclusion is wrong, because the premise is wrong: TOMA does not prohibit anyone from speaking. It merely provides that, when

a quorum of public officials discusses public business under their supervision or control, they must do so *openly*, and not in secret.

There is a fundamental difference between a law that actually restricts speech, on the one hand, and a law that merely requires that speech take place in the open. The former means less expression—while the latter means more expression, by expanding the audience of listeners.

This distinction was reaffirmed in *Doe*. The Court observed that open government laws (in that case, the Washington Public Records Act) impose "not a prohibition on speech, but instead a *disclosure* requirement," 2010 WL 2518466, at *6—echoing similar observations the Court made earlier this year in *Citizens United*: "'[D]isclosure requirements may burden the ability to speak, but they . . . do not prevent anyone from speaking.'" *Id.* (quoting *Citizens United*, 130 S. Ct. at 914). In *Citizens United*, the Court distinguished mere disclosure requirements from restrictions on corporate speech: "The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether." *Id.* at 886.

III. The Texas Open Meetings Act Is Constitutional Under *Doe* and *Citizens United*, Because It Is Substantially Related to the Important Governmental Interest In Ensuring Transparency In Public Proceedings and Accountability of Public Officials.

Plaintiffs' failure to recognize the fundamental distinction between speech bans and disclosure rules is fatal to their First Amendment claim. Contrary to their complaint, Compl. ¶ 29, disclosure and openness requirements are not subject to strict scrutiny. Open meetings laws need not be narrowly tailored to further only the most compelling governmental interests.

On the contrary, public disclosure and open government requirements that burden First Amendment rights are only subject to "exacting scrutiny"—and need only establish a "'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."

Doe, 2010 WL 2518466, at *7 (quoting *Citizens United*, 130 S. Ct. at 914). *See also id.* at *8 n.2 (rejecting application of strict scrutiny to disclosure and open government laws).

TOMA serves several important governmental interests. Most obviously, the Act empowers citizens to hold their representatives and officials in government accountable by enabling them to observe their conduct of public proceedings and discussions about public business.

In *Citizens United*, the Supreme Court observed that disclosure requirements "provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are in the pocket of so-called moneyed interests." 130 S. Ct. at 916 (quotations omitted). As the Court concluded, "[t]he First Amendment protects political speech," but laws that merely require disclosure "permit[] citizens and shareholders to react to the speech . . . in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.*

Likewise, in *Doe* the Court reaffirmed the importance of the public interest in "fostering government transparency and accountability," as well as in preserving the integrity of the electoral process. 2010 WL 2518466, at *7. In fact, the interests served by open government laws are "particularly strong with respect to efforts to root out fraud," because fraud "has a systemic effect": the absence of openness and transparency "drives honest citizens out of the democratic process and breeds distrust of our government." *Id.* (quotations omitted). The Court further noted that, although the government can certainly undertake measures to monitor itself, "[p]ublic disclosure can help cure the inadequacies" of the government's own policing efforts. *Id.* at *8. In sum, "[p]ublic disclosure . . . promotes transparency and accountability . . . to an extent other measures cannot." *Id. Doe*

involved the application of open government laws specifically to certain aspects of the electoral system in Washington State, but its principles apply with equal force to other government functions.[4]

In addition, open meetings laws serve not only the interests of the public, but also the interests of public officials themselves. Officials may promise their constituents that they believe in openness and transparency. But they may also want an opportunity to actually prove their fidelity to their constituents. After all, without a robust open meetings law on the books, a skeptical citizen may be unwilling to take the official at his or her word. A citizen may believe that the public discussion is actually a sham, and that the decision has already been carefully—and secretly—choreographed. Only by enacting and enforcing open meetings laws like TOMA can a public official begin to persuade the dubious citizen that what they see is indeed what they get.

Open meetings laws also protect public officials in yet another way. A public official may want to ensure that he or she is not excluded from discussions about public business by a majority of his or her colleagues meeting in secret. Without an enforceable open meetings requirement, however, there may be little an official can do to prevent a majority cabal from discussing, and deciding, public business at their exclusion. *See, e.g.*, *Rangra*, 2006 WL 3327634, at *2 (describing efforts to exclude city council member Nancy DeWitt from council deliberations).

IV. The First Amendment Protects the Right to Anonymous Speech—But Only When There Is Substantial Evidence of Threats, Harassment, or Reprisals.

The public interest in transparency and disclosure is an important one. But it is not absolute, to be sure. For example, a *private* individual has a First Amendment right to anonymous

4. *See also, e.g.*, *Bellotti*, 435 U.S. at 792 n.32 ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected."); *Buckley v. Valeo*, 424 U.S. 1, 68 (1976) ("disclosure requirements . . . directly serve substantial governmental interests"); *United States v. Harriss*, 347 U.S. 612, 625 (1954) ("Congress has not sought to prohibit these pressures [from lobbying speech]. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose.").

speech—provided that the person first demonstrate "a reasonable probability that the compelled disclosure . . . will subject [him] to threats, harassment, or reprisals from either Government officials or private parties." *Doe*, 2010 WL 2518466, at *9 (quotations omitted). *See also, e.g.*, *id.* at *17 (Sotomayor, J., concurring) (same); *id.* at *19 (Stevens, J., concurring) (same) (discussing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995)).

It is far from clear, however, that *public* officials, engaged in public business, enjoy *any* First Amendment right to secrecy against their own constituents. As Justice Scalia noted in *Doe*, "Plaintiffs point to no precedent from this Court holding that legislating is protected by the First Amendment. Nor do they identify historical evidence demonstrating that 'the freedom of speech' the First Amendment codified encompassed a right to legislate without public disclosure. This should come as no surprise; the exercise of lawmaking power in the United States has traditionally been public." *Id.* at *21 (Scalia, J., concurring). Indeed, our system of democracy is based on the very premise that public officials are subject to legitimate public protest and opprobrium—including the denial of reelection or reappointment based on their conduct of public business.[5]

In all events, Plaintiffs have not claimed any fear of threats or harassment. Nor could they, because they present only a facial challenge in this case. *See id.* at *9-10 (distinguishing between facial and as applied challenges for purposes of proving risk of threats, harassment, or reprisals). To succeed, Plaintiffs would have to show that TOMA places all persons at an unacceptable risk of threats, harassment, or reprisals in its *typical* application. This Plaintiffs plainly cannot do.

* * *

5. *See, e.g.*, *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1132 (2009) ("[O]f course, a government entity is ultimately accountable to the electorate and the political process for its advocacy. . . . If the citizenry objects, newly elected officials later could espouse some different or contrary position.") (quotations omitted).

The entire premise of Plaintiffs' attack is that TOMA (like *every* open meetings law) is a "content-based" regulation of speech, because it applies only to speech about public business.

But that is not the law. A disclosure requirement is content neutral so long as it merely requires a speaker to *disclose* speech he already intends to make, albeit perhaps only to a selected audience. Disclosure requirements are content based only if the law *changes* speech—by mandating a message the speaker would not have otherwise delivered. *Compare, e.g.*, *id.* at *17 (Sotomayor, J., concurring) (describing disclosure rule as "facially neutral"); *id.* at *18 (Stevens, J., concurring) (upholding disclosure rule because it does not "alter the content of a speaker's message"), *with, e.g.*, *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech."). For example, every lawyer is aware of the ethical ban on ex parte communications—a valid, content-neutral disclosure rule.

Like the open government law upheld in *Doe*, TOMA in no way "alters" the content of any speech. *Id.* It simply requires the speaker to disclose his or her chosen speech to a wider audience. As a result, it must be analyzed, and upheld, as a content-neutral disclosure law.[6]

PRAYER

For these reasons, the Court should grant summary judgment to Defendants.

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6. In addition to failing under First Amendment case law regarding anonymity and secrecy, Plaintiffs' attack fails for a broader reason: TOMA is a valid, content-neutral time, place, or manner regulation, because the interest in transparency and accountability served by the Act is not based on any desire to *suppress* or disfavor speech. Quite the contrary, the Act *expands* the audience of listeners, as previously noted.

Finally, and to the extent that Plaintiffs also allege vagueness or overbreadth, separate and distinct from their core First Amendment attack, this Court has already addressed, and properly rejected, these precise challenges to TOMA. *See Rangra*, 2006 WL 3327634, at *6-8 (holding that TOMA is neither unconstitutionally vague nor substantially overbroad, because it "does not restrict or inhibit a substantial amount of activity protected by the First Amendment"); *see also, e.g.*, *Holder v. Humanitarian Law Project*, 2010 WL 2471055, at *13 (U.S. June 21, 2010) ("perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity") (quotations omitted).

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